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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JOSE L., et al. Persons Coming Under
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

J.V.,

Defendant and Appellant.

G046449

(Super. Ct. Nos. DP011381,
DP011382)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Kimberly Menninger, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

* * *

Mother J.V. appeals from an order terminating her parental rights over Jose L. and Maribel L. She contends no substantial evidence showed the children were adoptable. But the record contains sufficient evidence of adoptability, including the prospective adoptive parents' willingness to adopt. We affirm.

FACTS

The First Permanent Plan: Long-term Foster Care

In March 2005, mother pleaded no contest to a dependency petition regarding six children: Miguel (then age 15), Irene (then age 12), Luis (then age 11), Angela (then age 8), Jose (then age 6), and Maribel (then age 4). In the petition, the Orange County Social Services Agency (SSA) alleged mother failed to protect the children from physical and sexual abuse. (Welf. & Inst. Code, § 300, subds. (b), (d).)¹ Mother's boyfriend had sex repeatedly with Irene, and had gotten her pregnant. Mother's boyfriend also sexually abused Jose, hit mother, and beat the children with a belt buckle. Mother had engaged in "chronic" domestic violence with "numerous partners in the presence of her children for approximately the past twelve years," and over that time had "been the subject of approximately twenty prior child abuse referrals." In addition, the petition alleged Miguel, Irene, and Luis had been previously abused by their alleged father. (§ 300, subd. (j).)

¹ All further statutory references are to the Welfare and Institutions Code.

The same month, Jose and Maribel were placed with foster parents. Two months later, a social worker reported “Maribel and Jose appear to be doing very well in their foster home. They are adorable, friendly children. Jose just started school where he is having a tough time. He has an IEP [individualized education program] and receives speech-language therapy. Jose will probably repeat first grade but he is young for first grade anyway, and this will give him a chance to catch up and still be with his same-age peers as he advances through school. Maribel is not yet of school age, but is very aware and verbal.”

A social worker reported again on Jose and Maribel in February 2006. Jose was “in good health” and “well behaved in the classroom and at home. It has been reported that Jose is a sweet little boy.” On the other hand, he was “highly distractible and [had] difficulty learning,” and was “developmentally delayed in his speech and language skills.” Maribel was a “well-behaved sweet child,” who was “working below grade level” in school but “tr[ying] hard to do her best.” “[I]t was probable” Jose and Maribel “would be adopted, but [they] could be difficult to place due to being a member of a sibling group.” Jose also might be difficult to place because he was “over the age of seven.”

Not much changed by July 2006. Jose was “happy,” with “excellent school behavior” and no “behavioral problems at placement or at home.” He was still “developmentally delayed in his speech and language skills” and “behind in academics,” and would “be placed in the Learning Handicapped Program for all his classes.” Maribel was “doing very well academically,” with no behavioral or developmental issues. It was still “probable that the children will be adopted,” but placement would be “difficult” for siblings their ages. The social worker recommended the children be placed in long-term foster care.

The court conducted a hearing to select and implement a permanent plan for the children in November 2006. (§ 366.26; .26 hearing.) The social worker

recommended long-term foster care because “uprooting them from their current situation would be extremely difficult for them,” they were bonded to mother and mother’s family, and “being part of a set of siblings is very critical to them.” The court found the children were not adoptable and ordered them to remain in long-term foster care.

The Next Permanent Plan: Adoption

From late-2006 until May 2011, Jose and Maribel remained placed with their foster parents. As of the spring of 2007, Jose was trying “very hard” in school and “making good progress,” but still “far below grade level in his math and writing skills.” Maribel was “working at grade level in most academic subjects” and “a pleasure to have in class.” By the spring of 2008, Maribel was “struggling with her academics more this year than in the previous years,” and started “receiving tutoring.” In the summer of 2008, teachers reported Jose had “problems focusing” and “a very low frustration tolerance.” He was “referred for a psychiatric evaluation.” But by that fall, Jose’s troublesome school “behaviors [had] substantially decreased,” with “no need for further intervention at this time.”

By October 2008, Jose’s “behavioral problems” were resurfacing at school. Around the same time, Maribel walked from school to visit her mother, who was subject to a probation condition barring contact with minors, including her children. Maribel told mother her foster father threatened to cut off her arms. Maribel later admitted she made up the story about her foster father — she “explained that she missed her mother, she wanted to go and live with her and that she was mad at the foster father for being angry with her” Maribel confirmed “she was happy living in the foster home and . . . wanted to remain living there.”

In the spring of 2009, Maribel “started acting out at school.” She was “referred for therapy again to address these new concerns.” Testing around that time revealed Jose’s IQ to be “in the 60s (normal IQ score[s] range from 80 to 120),” but he

“scored surprisingly well in his adaptive functioning skills, which is remarkable for a child with an IQ so low.” Jose’s teacher reported continued behavioral problems, but an assistant principal thought Jose was “doing quite well.” A school psychologist would work with the teacher, whose own frustration was “coloring her perspective.”

In the spring of 2010, Jose was “making progress with tutoring assistance.” A therapist reported Jose “exaggerate[es] in order to receive attention . . . due to past neglect.” He also has problems differentiating reality from fantasy, which could “be related to his learning disabilities.”

Maribel’s behavior had suddenly “totally changed at school”; she was “talking back to the teacher” and “not getting along with other kids.” But by the summer of 2010, Maribel had become “less defiant in school” and had “fewer conflicts with peers.”

Meanwhile, Jose and Maribel were transitioning towards adoptability. Since 2007, SSA had concluded the children were not adoptable due to their strong sibling bonds and comfort level with their foster parents. Starting in 2009, social workers began talking to the children about adoption. As of March 2010, the children still struggled with “the general concept of adoption,” though therapy might help them “process[] the grief and loss that is naturally inherent in moving from their current foster home.” In therapy, Jose stated “it would be nice to maybe move to a new place,” though it was still “difficult for Jose to understand the reality of it.” Maribel was “open to providing and receiving feedback about adoption,” but still “express[ed] connection to [her] current foster parents.” By September 2010, a social worker concluded Jose and Maribel were adoptable.

After expressing a “strong desire for adoption,” Jose and Maribel were placed with prospective adoptive parents in May 2011. The same day they were placed, Jose saw a psychiatrist who diagnosed him with mood disorders and posttraumatic stress disorder (PTSD). The psychiatrist prescribed an antipsychotic medication, but agreed

with the prospective adoptive parents to hold off on starting the medication to “observe how the extra support in the [new] home affected [Jose’s] behavior and stability.”

By the next month, Jose was “more cheerful, more balanced” at school and “better able to handle small disruptions that in the past would have caused him to become ‘frazzled.’” Maribel was “friendly, verbal, and energetic,” “developmentally on target,” and the June “Student of the Month.” The children were “happy in their placement,” enjoyed “good relationships with their caregivers and their children,” and “made noticeable improvements in their emotional, behavioral, social and educational needs.” Jose’s Court-Appointed Special Advocate (CASA) reported Jose was “the happiest I have ever seen him since I was appointed his CASA three and a half years ago,” with “much more” self-confidence. The CASA was “encouraged by Jose’s progress in the short time he has been placed in his new foster home.” Jose began taking his antipsychotic medication in August 2011.

In September 2011, SSA requested the court set a new .26 hearing. Jose and Maribel “expressed continued interest in adoption with their present family.” “[S]ince his placement change in May 2011,” Jose had “made significant improvement” with his “irritability, verbal aggression, and lack of impulse control in school.” And “[s]ince his placement change, Jose has appeared to be more cheerful and less reactive to stressors and stimuli.” Maribel had “made improvements in school in being more compliant and being more respectful to her teacher and others.”

The final SSA report found “it is likely that the children will be adopted.” It noted, “Jose is a handsome, engaging, and friendly thirteen year old Hispanic male,” with “a sweet smile. Jose has a small stature for his age but is physically healthy. Jose enjoys and easily participates in physical activities Jose has an open and sociable personality. . . . Jose generally carries a happy disposition and a positive outlook.” While he “has struggled with anxiety and acting out behavior,” “Mood Disorder,” “PTSD,” a “language disorder,” and “low” academics, “Jose has been receptive to

therapeutic treatment and medication management. Jose has also made behavioral improvements due to the stability and support of his current placement.” The report further noted: “Maribel is a pretty, bright, and easy going eleven year old Hispanic female,” who “enjoys physical activities like swimming, soccer, and softball. Maribel is healthy and is developmentally on track.” It concluded, “The children are young, healthy, friendly, and lovable. They are eager to be loved and to have a permanent and stable family. Jose has had educational, emotional and behavioral impairments but he has responded well to services and support. . . . [T]he children will respond very well to adoption.”

In December 2011, Jose’s CASA reported “the most noteworthy improvement in Jose’s physical, social, mental, and emotional condition . . . due to the genuine love and dogged perseverance of the new caregivers.” Jose was “able to go outside and play with children in the neighborhood and have friends over. His therapists and caregivers are not only giving him tools for relationship building, but reinforcing them on a daily basis.” He stopped “fabricating far fetched stories for attention,” “improved from a second to third grade [reading] level,” and was “able to apply what he is learning to his everyday life.” Jose’s “speech has slowed down and is more intelligible due to the constant reinforcement and correction from his caregivers.” He was “finally in a healthy family environment where they are helping him grow into an independent self-reliant individual,” and was “finally able to enjoy being a normal child in a loving home.”

The court conducted the second .26 hearing in February 2012. Mother’s counsel stated: “Mother is not present. I’m not making a motion to continue because my last conversations with mother centered around the fact that she was in agreement with the termination of her parental rights, and she authorized my office to proceed if she was not here today.” The court found Jose and Maribel were likely to be adopted, and terminated mother’s parental rights.

DISCUSSION

Sufficient Evidence Shows the Children Are Adoptable

Mother contends her parental rights were wrongly terminated because the children — especially Jose — are not adoptable. “The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time.” (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400 (*Erik P.*); accord § 366.26, subd. (c)(1).) “In reviewing the juvenile court’s order, we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the children were] likely to be adopted within a reasonable time.” (*Erik P.*, at p. 400.) “““The contention that a judgment is not supported by substantial evidence . . . is an obvious exception to the [waiver] rule.””” (*Id.* at p. 399.)

“The issue of adoptability . . . focuses on the *minor*, e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor.” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*)). “Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor’s age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent’s willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*” (*Id.* at pp. 1649-1650.)

“[I]n some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child.” (*Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.) When the probability of adoption is “based solely on the existence of a prospective

adoptive parent who is willing to adopt the minor, an inquiry may be made into whether there is any legal impediment to adoption by [the prospective adoptive] parent.

[Citations.] In such cases, the existence of one of these legal impediments to adoption is relevant because the legal impediment would preclude the very basis upon which the social worker formed the opinion that the minor is likely to be adopted.” (*Ibid.*)

Here, substantial evidence shows Jose and Maribel are adoptable. Mother devotes most of her brief to questioning Jose’s adoptability. But the prospective adoptive parents are willing to adopt him, along with Maribel. Their desire to adopt Jose shows his educational and behavioral issues “are not likely to dissuade individuals from adopting the minor” (*Sarah M., supra*, 22 Cal.App.4th at pp. 1649-1650), and that he “is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*” (*id.* at p. 1650). But other evidence indicates Jose’s adoptability. Even back in 2006, before the first .26 hearing, social workers described Jose as “happy,” healthy, and “a sweet little boy.” Teachers reported behavioral problems at school after that, to go along with his educational challenges, but in 2009 his assistant principal concluded the problems were mostly with his frustrated teacher — she thought Jose was “doing quite well.” Jose was “making progress with tutoring assistance” by 2010. The final SSA report noted Jose was “engaging[] and friendly,” “open and sociable,” with “a happy disposition and a positive outlook.” Despite struggles with his academics and psychological issues, “Jose has been receptive to therapeutic treatment and medication management.” This evidence sufficiently shows Jose is generally adoptable.

Even if Jose was found adoptable “based solely” on the prospective adoptive parents’ willingness to adopt, mother identifies no “legal impediment to adoption.” (*Sarah M., supra*, 22 Cal.App.4th at p. 1650.) And no such impediment appears in the record. Nothing shows the prospective adoptive parents are too close in age to Jose, for example. (*Ibid.* [listing legal impediments].) In addition, the record sufficiently shows “the prospective adoptive parents can meet [the] child’s needs”

(*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1062 [noting the “inquiry required where the child in question is completely developmentally disabled”].) The prospective adoptive parents had previously adopted four abused and neglected children, who ““blossomed”” in their care. The prospective adoptive parents “have a good support network,” “are reportedly in good health,” and “promptly attend to all of the children’s needs in school, health, mental health, and developmental issues. . . . Jose and Maribel are thriving in their care.”

Mother contends the children’s “brief stay” with the prospective adoptive parents was an “exercise in experimentation,” and that “being in the new home for only six or seven months was not enough time” to see whether the “brief honeymoon period” would end. This is an invitation to reweigh the evidence, which we decline. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 165 [appellate court “resolv[es] all conflicts in support of the judgment,” and “does not reweigh the evidence”].)

In any event, the record shows a consistent commitment by the prospective adoptive parents to caring for Jose. One parent taught at Jose’s school, and knew him for months before he was placed with them. (Cf. *Erik P.*, *supra*, 104 Cal.App.4th at p. 400 [“Erik’s prospective adoptive family knew about Erik’s family history of mental illness”].) With their “genuine love and dogged perseverance,” Jose made “the most noteworthy improvement in [his] physical, social, mental, and emotional condition.” No one knows with certainty what the future holds, for Jose or anyone else. But we do not demand clairvoyance.² (See *In re Marina S.*, *supra*, 132 Cal.App.4th at p. 165 [child

² Mother relies on *In re Jayson T.* (2002) 97 Cal.App.4th 75, in which postjudgment evidence showed the prospective adoptive parents had a change in heart. There is no such evidence here. Moreover, the California Supreme Court expressly disapproved *Jayson T.*’s “expansive view of the scope of an appeal of an order terminating parental rights.” (*In re Zeth S.* (2003) 31 Cal.4th 396, 412.) “[C]onsideration of postjudgment evidence of changed circumstances in an appeal of an order terminating parental rights . . . would violate both the generally applicable rules of appellate

adoptable; fears of legal orphanage if prospective adoptive parents are unable to adopt was “completely unfounded”]; see also *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223-225 [child adoptable despite genetic predisposition for developmental problems].) The evidence before the court sufficiently supports its adoptability finding.

Mother Cannot Avail Herself of the Sibling Relationship Exception

For the first time on appeal, mother contends her parental rights should not be terminated due to the sibling relationship exception. “At a section 366.26 hearing, once [SSA] has shown it is likely the child will be adopted, the burden shifts to the parents to prove that termination of parental rights would be detrimental to the child based on one of the exceptions enumerated in subdivision (c)(1).” (*Erik P.*, *supra*, 104 Cal.App.4th at p. 401.) One such exception is the “substantial interference with a child’s sibling relationship” (§ 366.26, subd. (c)(1)(B)(v).)

Mother waived the issue by not raising it below. “The application of any of the exceptions enumerated in section 366.26, subdivision (c)(1) depends entirely on a detailed analysis of the relevant facts by the juvenile court. [Citations.] If a parent fails to raise one of the exceptions at the hearing, not only does this deprive the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record from which to conclude whether the trial court’s determination is supported by substantial evidence. [Citation.] Allowing [mother] to raise the exception for the first time on appeal would be inconsistent with this court’s role of reviewing orders terminating parental rights for the sufficiency of the

procedure, and the express provisions of section 366.26 which strictly circumscribe the timing and scope of review of termination orders” (*Id.* at p. 413.)

evidence. Therefore, [mother] has waived the right to raise the exception.”³ (*Erik P.*, *supra*, 104 Cal.App.4th at p. 403; accord *In re Daisy D.* (2006) 144 Cal.App.4th 287, 292 [failure to raise exception “forfeits the issue for purposes of appeal”].)

Even if we reached the issue, that the sibling exception could not apply here. Mother has no role in Jose and Maribel’s relationships with Miguel, Irene, Luis, and Angela. Miguel, Irene, and Luis have reached the age of majority. Angela lives with her father and “has no contact with her siblings.” “Where the parent’s continuing relationship with the dependent child, or absence thereof, can in no way affect the nature of the sibling relationship because the parent no longer has a relationship with the sibling, the exception does not apply.” (*Erik P.*, *supra*, 104 Cal.App.4th at p. 404.)

Finally, we note “the ‘sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption.” (*In re Celine R.* (2003) 31 Cal.4th 45, 61.) “[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount.” (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.) Here, “[v]aluing [the children’s] continuing relationship with [the older siblings] over adoption would deprive [them] of the ability to belong to a family, which is not in [their] best interests.” (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953.)

³ *Erik P.* held the father waived the right to raise the sibling relationship exception, but did not waive the right to challenge the adoptability finding for insufficient evidence. (See *Erik P.*, *supra*, 104 Cal.App.4th at p. 399.)

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.